IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

79-793

No. ——

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner

and

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
BURLINGTON NORTHERN, INC.,
THE COLORADO AND SOUTHERN RAILWAY COMPANY,
FORT WORTH AND DENVER RAILWAY COMPANY,
THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Respondents

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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* Now modified as 49 U.S.C. § 10101 *et seq.* in the *Revised Interstate Commerce Act* (P.L. 95-473, 92 Stat. 1337).

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JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Houston Lighting and Power Company ("Houston") and petitioner Arizona Electric Power Cooperative, Inc. ("Arizona") jointly pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on June 26, 1979.

OPINIONS BELOW

The June 26, 1979, opinion of the Court of Appeals, which is not yet officially reported, appears as Appendix A to this Petition.[1] A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals in an order dated August 22, 1979, not officially reported, which is attached hereto as Appendix B. The November 28, 1977, decision and order of the Interstate Commerce Commission ("I.C.C." or "Commission") in its *Docket No. 36612, Incentive Rate On Coal—Gallup, New Mexico To Cochise, Arizona,* reported at 357 I.C.C. 683 (1977), and the November 28, 1977, decision and order of the Commission in *Docket No. 36608, Incentive Rate On Coal—Cordero, Wyoming To Smithers Lake, Texas,* reported at 358 I.C.C. 537 (1977), which were affirmed by the Court of Appeals, appear, respectively, in Appendices C and D.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1979, and appears as Appendix E. The order denying rehearing (Appendix B) was entered August 22, 1979. This Petition for Certiorari is thus timely filed under 28 U.S.C. § 2350. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In these separate but similar cases, the Interstate Commerce Commission interpreted and implemented, for the first time, a new provision in the Interstate Commerce Act for gauging maximum reasonable rail-

[1] The appendices are separately bound in a companion volume cited as "Pet. App. —."

road rates added by the *Railroad Revitalization And Regulatory Reform Act of 1976,* Pub. L. No. 94-210, 90 Stat. 31 (1976) ("*4-R Act*"). This question of first impression was precipitated by circumstances of the utmost concern to our national interest—the massive effort of major consumers of gas and oil to convert to abundant, domestic coal. The questions presented are:

1. Whether the *4-R Act* changed the standards of maximum rate reasonableness for rail freight rates in a fashion which justifies permitting the monopoly-powered railroads of the west to expropriate, through inflated freight rates, the economic benefits flowing from the massive efforts of major western energy consumers to convert from high-priced oil and gas to cheap, domestic coal.

2. Whether the lower court erred in affirming unreasoned and arbitrary agency action because it was a "temporary approach" when the approach was permanent and final for petitioners.

STATUTORY PROVISIONS INVOLVED

The relevant statutes are Sections 101(b), 205 and 206 of the *4-R Act* which are set forth in full in the Appendix. These sections added or amended Sections 1(5), 15(19) and 15a(4) to the Interstate Commerce Act which now appear in the new Revised Interstate Commerce Act as Sections 10101, 10729 and 10704(a)(2) of Title 49, United States Code.

STATEMENT OF THE CASE

A. The Genesis Of These Disputes.

The severity of our nation's energy problems and their impact on our economy need no documentation.

They confront us daily. Among the earliest to feel the impact of our growing shortage of certain fuels were the electric utilities of the west and southwest who suddenly saw their seemingly endless supplies of natural gas and oil dwindle away or be denied to them by state and/or federal laws and regulations.

The best and most immediate solution to our nation's energy and its derivative economic problems rests with the increased industrial utilization of our cheap, abundant, and environmentally sound supplies of bituminous coal. Huge such coal deposits are found in many regions of the west. Houston and Arizona were among the first major consumers of gas and oil in the west to start upon the long and very costly process required to convert from the use of oil and gas to coal.[2] Along the way, they had to find ways of raising the billions required for coal burning plants; contend with a variety of environmental litigations;[3] and overcome legal problems concerning access to coal supply much of which is owned by Indian Nations. None of these formidable obstacles to their new use of coal proved to be as vexing, permanent, or severe, however, as the railroad problem. The prosperous coal hauling roads of the west are the sole current means of transportation be-

[2] The combined *initial* annual coal requirements of Houston and Arizona are 6 million tons, which displaces 18 million barrels of oil, or 108 million mcf of natural gas! Houston could ultimately consume over 100 million tons of coal annually if it converted totally to coal.

[3] This Court had occasion to deal with environmental issues associated with the development of some of the very same western coal reserves here involved in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 396 (1976).

tween the distant coal fields and the sites of the Houston and Arizona power plants.[4] In 1974, when Houston and Arizona committed themselves to the future and long-term utilization of coal, the going price for coal transportation, which generally makes up between one-half and three-quarters of the delivered coal cost,[5] was vastly less than the price demanded by the same railroads as the plants neared completion.[6] Flexing their new market power created by OPEC actions, the railroads sought to extract greatly increased profits from the massive new coal movements which were captive to their lines.

B. Proceedings At The I.C.C.

With the railroads unwilling to discuss or negotiate their spiraling coal transportation price demands, which prices are passed directly on to the electric cus-

[4] The railroads have aggressively protected their monopoly over transportation of western coal by successfully opposing the construction of coal slurry pipelines, the only other feasible mode of transport. See e.g., *Hearings Before the House Committee on Interior and Insular Affairs on Coal Slurry Pipeline Legislation*, 94th Cong., 1st Sess. (1975), Serial No. 94-8, p. 917 *et seq.*

[5] Thus, in Houston's case the coal currently costs in the neighborhood of $6.00 per ton, while the cost of rail transportation from the mine to the plant is roughly $19.00 per ton.

[6] For example, Houston had been quoted rail prices which were nearly doubled following its commitment to coal power. Subsequently, is a nearly identical situation in San Antonio, the Commission was to describe the approach of these same railroads as "bait and switch tactics" where the receiver "was persuaded to enter into particular long-term arrangements for the supply of coal as fuel based upon a perceived bargain with defendants. Once these commitments had effectively eliminated the railroads' competition, they engaged in various pricing maneuvers in an attempt to use their newly monopolistic position to enhance their revenues." *San Antonio, Texas* v. *Burlington Northern, Inc.*, Docket No. 36180, Decision Served October 25, 1979 (unprinted), p. 9, (Appeals docketed, Nos. 78-2051, 78-2216, and 78-2307, D.C. Circuit).

tomers, Houston and Arizona instituted formal proceedings before the I.C.C. to secure its prescription of a just, lawful, and non-discriminatory rail rate for their coal transportation requirements.

While these proceedings were in progress, the railroads resorted to an as then untried provision of law authorizing railroads to propose so-called, capital incentive rates.[7] The rates so proposed by the railroads were at truly exalted levels. For example, the rate proposed by the railroads to Arizona was at a level nearly three (3) times greater than the rate prescribed a few months earlier by the Commission as the maximum on a new coal movement to San Antonio, Texas.[8]

While Houston and Arizona vigorously challenged the lawfulness of the use of these new ratemaking procedures in connection with their new coal movements, the real dispute was over the amount per ton of the proposed rates. Both Arizona and Houston asserted that the railroad rate proposals were unlawfully high when measured against the costs of the services; the rates for similar movements; and the requirements of the public interest—the traditional rail ratemaking considerations.[9] The railroads argued that under the

[7] This statutory provision was added to the Interstate Commerce Act by Section 205 of the *4-R Act* which appears at Pet. App. 1f. The Commission has since noted that the unique capital incentive rate procedures were employed in these cases by the railroads as an "economic weapon." *Capital Incentive Rate Regulations*, 361 I.C.C. 778, 789 (1979).

[8] *San Antonio* v. *Burlington Northern, Inc.*, 355 ICC 405, *aff'd sub nom., Burlington Northern, Inc.* v. *United States*, 555 F.2d 637 (8th Cir. 1977).

[9] See, e.g., *Burlington Northern, Inc.* v. *United States, supra*, 555 F.2d, 641; *Westinghouse Electric Corp.* v. *United States*, 388 F. Supp. 1309, 1317 (W.D. Pa. 1975).

new law, they were entitled to engage in demand pricing on captive coal traffic so as to generate extra revenues to cross-subsidize deficit traffic of other types.

The Commission, after taking evidence and argument, approved each rate exactly as filed by the carriers. The primary basis relied upon for its orders approving the rates was the new provision of the *4-R Act* which directs the Commission to assist railroads in attaining adequate revenues. (Pet. App. 17c, 24d)[10] Since it had not defined what constituted adequate railroad revenues; whether these railroads enjoyed them or not; or how they were to be achieved in a case involving only a single movement of traffic, the Commission fashioned some "proxy tests" for these purposes in the Houston case. (Pet. App. 24d) As to the Arizona movement, the Commission simply observed that the extremely high and demand-based rate would result in increased profits for the railroads which would help meet the *4-R Act* goals of revenue adequacy. (Pet. App. 18c) The unreasoned and unprincipled ratemaking determinations of the agency which were reached in these cases are perhaps best revealed in the fact that while each utility receives essentially the same transportation service, the rate approved in Arizona is nearly twice as high as the rate approved in Houston[11] which rate was itself vastly greater than the prevailing rates for similar movements. (Pet. App. 20d)

[10] This provision, Section 206 of the *4-R Act* is set out at Pet. App. 2f.

[11] Expressed in comparable terms of mills per ton mile (per ton rate ÷ mileage), the Houston rate was 9.71 mills and the Arizona rate 16.5 mills.

C. The Court Of Appeals Decision.

Upon review,[12] the lower court first agreed that the railroads were entitled to have their tariffs considered under the new capital incentive procedure. (Pet. App. 8a-20a) It then turned to its review of the Commission's treatment of the lawfulness of the proposed coal rates noting that they must be evaluated by the same standards under which all other railroad rates are to be measured. (Pet. App. 20a) The court quickly dispensed with the Commission's treatment of the issues of costs and comparable rates which had, heretofore, been crucial in rail rate cases as matters for "agency expertise." (Pet. App. 26a-28a) Rather, it focused its consideration on the Commission's interpretation and implementation of the new railroad revenue need provisions of the *4-R Act* which, in agreeing with the Commission, it held had worked a "modification of the regulatory approach" to the establishment of maximum railroad rates. (Pet. App. 31a) After first observing that the Commission had yet to issue the regulatory standards mandated by the new law to measure revenue need and to relate a carrier's overall need to a specific movement, the court examined the Commission's findings as to the lawfulness of each rate under the new ratemaking standard which the agency utilized. The new standard was said to justify the use of the demand pricing principles upon which the Arizona rate was based. (Pet. App. 32a) Seemingly mindful of the fact that there is no upper limit to this type of demand-based pricing on captive traffic such as coal, the court wrongly cited some limits placed on the Houston rate as a limitation on the Arizona rate. (*Id.*) It thus finessed the hard question of where the upper limits lay. The court

[12] Jurisdiction in the lower court was asserted under 28 U.S.C. § 2341 *et seq.* and the Houston and Arizona cases were consolidated.

then reviewed the totally different reasons and standards employed by the I.C.C. in the Houston case which it identified as "proxy tests." the court was forced to admit that it had "problems in tracking and understanding the Commission's approach" but then in effect said that although the agency's path was only "dimly discerned" it could not say it was wrong. (Pet. App. 33a) In the final analysis, as to both cases, it let the flimsy reasoning relied upon by the I.C.C. scrape by on the theory that it was only a "temporary approach" to railroad, maximum rate regulation. (*Id.*)

As a consequence of the court's affirmance of the Commission's two separate orders, each of which is based on a very different ground and both of which are bereft of reasoned findings, the crucial questions of how our nation's burgeoning coal transportation needs will be priced has degenerated into chaos of unprecedented dimensions. Because the court affirmed the landmark agency implementation of a new system of railroad rate regulation in cases where the agency neglected to articulate or explain its reasons, there exists today no guidance on the principles, standards, or criteria whereby maximum reasonable railroad rates are determined for coal transportation or for that matter, any other transportation. This vacuum has led to ensuing litigation of unprecedented volume and financial consequence.

REASONS FOR GRANTING THE WRIT

1. The Pricing Of Coal Transportation Is Too Important To The National Interest To Go By Default

The cases here are the tip of a mushrooming iceberg. The I.C.C.'s orders affirmed by the lower court have heralded a new era of railroad rate regulation which is

totally without metes, bounds, or recognizable principles. While the Commission and the court have each emphasized the emergence of a new, rail regulatory scheme centered around rail revenue needs, they have done little else. The railroads, the new coal users, and the public have been left without any rational standards or guidelines for establishing maximum rates on captive coal traffic under the new regulatory regime. The results of these omissions are predictable.

Since these decisions were handed down, a firestorm of coal rate litigation has ensued, as emboldened railroads seek to exact staggeringly high rates and rate increases from captive coal traffic. The reactions of the I.C.C. have been unreasoned, fluctuating, and no less unsatisfactory than its analysis in the Houston and Arizona cases. Coal rates have been set over an irreconcilable spectrum on a case by case basis without rhyme or reason. Indeed, one Commissioner has repeatedly castigated the agency for its "disjointed and inconsistent approach to the western coal rate cases" [13] while another has labeled the decisions in these cases as "the height of arbitrary and capricious action" and a "wholesale retreat from reasoned decision-making." [14]

At this very moment, there is a multitude of financially consequential coal rate cases in vigorous litigation

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[13] *San Antonio, Texas* v. *Burlington Northern, Inc.*, Docket No. 36180, Decision Served June 1, 1979 (unprinted), p. 17 (dissenting opinion of Commissioner Gresham) (Appeals docketed, Nos. 78-2051, 78-2216 and 78-2307, D.C. Circuit).

[14] *Annual Volume Rates on Coal—Wyoming To Flint Creek, Arkansas*, Docket No. 36970, and *Southwestern Electric Power Co.* v. *Burlington Northern, Inc.*, Docket No. 26980, Combined Decision Served May 25, 1979) (unprinted), (dissenting opinion of Commissioner Christian Served June 20, 1979), p. 1 ("SWEPCO") (Appeals docketed, No. 79-2082, 5th Circuit, and No. 79-1547, D.C. Circuit).

before the Commission [15] and the federal courts.[16] All of these cases are identical to the cases here in the sense that each grapples to the satisfaction of no one with the standards and criteria for establishing maximum reasonable rail rates on the emerging movements of coal from western origins and elsewhere. Both the nation's prospective coal consumers [17] and the United States Department of Energy [18] have charged that the I.C.C.'s erratic and unreasoned administration of the *4-R Act* rate provisions is having a "chilling effect" on coal conversion. Only very recently the I.C.C. itself has verified that as rail rates escalate, coal usage shrinks and foreign oil makes up the difference.[19]

It is respectfully submitted that the manner in which our nation's enormous coal transportation requirements are to be priced is a matter of such compelling national consequence as to merit the attention and guidance of the Court. No matter where one stands on the merits, all must be in agreement that the existing situation is chaotic, conflicting and satisfactory to none.

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[15] A list of coal rate cases currently pending before the Commission is set out in Appendix G.

[16] A list of 27 appeals filed by shippers, railroads and the States of Texas and Kentucky is set out in Appendix H.

[17] *Escalation of Railroad Coal Tariffs, Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 98th Cong., 1st Sess. (April 16, 1979) ("*Hearings*"). Statement of Bruce A. Melaas of Celanese Chemical Company.

[18] *Id.* Statement of Lynn R. Coleman, General Counsel, United States Department of Energy.

[19] *Ex Parte No. 347, Western Coal Investigation—Guidelines For Railroad Rate Structure*, Draft Environmental Impact Statement served October 19, 1979, p. xiii.

The root cause of the current chaos in maximum rate regulation by the Commission is its acceptance of overall railroad "revenue need" as its loadstone and primary guide in judging the lawfulness of specific rates without in any rational fashion relating such overall needs to the rate for a particular movement or even making any determinations of the extent to which, if at all, the revenues of the individual carriers involved are inadequate. In affirming the Commission's decisions in the Houston and Arizona cases, the Court of Appeals chose to overlook the fact that there was absolutely no attempt to meaningfully relate revenue adequacy considerations to the rate approved for Arizona and excused the incomprehensible attempt of the Commission to quantify the effect of this new standard in the Houston case on the grounds that it was but a temporary approach. It is a fundamental principle of administrative law that before a reviewing court can affirm the decision of any agency under the standards set out in the Administrative Procedure Act, the court must be able to understand the basis for that decision. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 165-68 (1962); *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 762-63 (1963); *Atchison, T. & S. F. Ry. Co.* v. *ICC,* 580 F.2d 623, 634 (D.C. Cir. 1978). The need for reasoned explanation of agency action is particularly important where such action entails a departure from prior norms, *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 808 (1973); *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 652-53 (1954).

In these cases the Commission prejudged the result of a then-pending rule-making proceeding to conclude that Section 205 revenue adequacy considerations

should be a factor in judging the lawfulness of individual rates. In doing so it rejected a body of established precedent that "lack of adequate revenues from operations as a whole affords no reliable measure of the reasonableness of rates . . . on individual commodities." *Scott County Milling Co.* v. *Butler R.R.,* 194 I.C.C. 763, 785 (1933).[20]

Having concluded that the *4-R Act* worked a major change in the law governing maximum rate reasonableness, it was incumbent upon the Commission, at an absolute minimum, (a) to make some coherent determination as to whether or not the railroads involved, in fact, were enjoying "adequate" revenues as contemplated by Section 205 of the *4-R Act;* and (b) if the determination was that they were not, to relate in a meaningful and understandable way the degree of inadequacy in the carriers' overall revenues to the need for the extremely high rates approved in these cases. There were no such findings made by the agency and the Court of Appeals confessed that it was unable to understand the Commission's only attempt to deal with this issue. Thus, the court should have vacated the Commission's decision and remanded for a proper consideration of this matter. Its failure to do so was error.

As noted, the basis for the court's action in affirming the Commission's decisions notwithstanding the patent lack therein of sufficient findings or explanations on the determinative new ratemaking criteria supposedly ordained by the *4-R Act,* was that the Commission's approach was only temporary. But the fact that an agen-

[20] The Circuit Court itself recognized that "under traditional principles, a carriers revenue needs had no relevance to the determination of the reasonableness of any individaul rate." Pet. App. 31a.

cy's decision may deal with a new statutory provision or that it is not intended by the agency to represent its final position on the issues presented can afford no basis for departing from the rule requiring the agency to spell out the legal basis for its decision so that a reviewing court can determine whether proper legal standards were applied. As the District of Columbia Circuit itself stated on a different occasion: "Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where . . . the area under consideration is one wherein the Commission's policies are in a flux." *Greater Boston Television Corporation* v. *F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970). See also *Port Terminal Railroad Ass'n* v. *United States,* 551 F.2d 1336 (5th Cir. 1977).

It most also be noted that the Court of Appeals erred in several respects in its judgment that the "temporary" nature of the Commission's approach in these cases warranted a relaxed standard of review. In the first place, the court's perception that the Commission's "dimly discerned" revenue-need analysis was a temporary phenomenon was erroneous. The court's opinion indicates that comprehensive revenue adequacy standards were established in rulemaking proceedings concluded in January, 1978, thus making the Commission's decisions here isolated instances. (Pet. App. 30a) In fact, however, the *ad hoc* approach utilized by the Commission in these cases is to this day the manner in which the Commission establishes or evaluates maximum rates for captive coal traffic.[21] More impor-

[21] *See,* e.g., *SWEPCO, supra* n.14; *Increased Rates On Coal, Colstrip and Kuehn, MT to Minnesota,* Docket No. 37105 Decision Served October 26, 1979 (unprinted) (Appeal docketed, Nos. 79-2286 and 79-2295, D.C. Circuit).

tant, however, is the fact that even if the approach were temporary, the chaos in the area of coal freight rates brought on by these decisions is too damaging to this country's national energy policy objectives and other public interests to permit the hands-off attitude adopted by the Court of Appeals. Elsewhere the D.C. Circuit has noted the special importance of comprehensive agency findings where the public interest demands close scrutiny of the agency action. *Brooks* v. *Atomic Energy Commission,* 476 F.2d 924 (D.C. Cir. 1973).[22]

As the plethora of cases engendered by the Commission's decisions in these cases dramatically illustrates, there was and is an urgent need for the Court to impose upon the Commission the discipline of formulating rational guidelines for maximum rate regulation under the *4-R Act*. The tremendous public interest concerns involved in these proceedings—the effect of excessive freight rates on the nation's coal conversion program; the inflationary impact of such rates;[23]

[22] It is axiomatic that the requirements of the public interest should be the foremost consideration in determining the reasonableness of rates. *See, e.g., Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592 (1948); *Hansen Packing Co.* v. *Baltimore & O. Co.,* 201 I.C.C. 75, 77 (1934); *Southern Class Rate Investigation,* 100 I.C.C. 513, 603 (1925). The *4-R Act* continued to recognize this principle in its policy section declaring it to the "the policy of the Congress in this Act . . . to balance the needs of the Carriers, shippers and public. . . ." *4-R Act,* Section 101(b)(1).

[23] The current coal freight rate situation also entails threatening portents for the nation's balance of payments problems. In the face of extremely high rates and continuing uncertainty over the governing principles of ICC rate regulation, there is a growing interest in foreign coal among coal consumers in coastal areas. A utility in Florida is importing major volumes of Polish coal and a utility in Texas has recently purchased a test load of South African coal. *Hearings, supra,* statement of M. L. Borchelt of Central Power and Light Company.

the plight of the electricity consumers who must pay for them in their monthly utility bills; and the necessity to provide for the legitimate needs of the railroads —all demand that the issues involved in these cases be dealt with immediately rather than put off in hopes that the Commission will some day, some way improve its performance.[24]

2. Unlike All Other Coal Receivers, If This Petition Is Denied Petitioners Will Get No Second Chance

Totally apart from the deficiencies in the court's decision discussed above, there is a separate and compelling reason why its action in permitting the Commission's inadequate revenue need analysis to scrape by in these cases because it was a temporary approach was clear error. Under the unique statutory provision involved in these cases, a rate, once approved by the Commission, cannot thereafter be set aside by the Commission for a period of five (5) years. Thus, even if the Commission had now or were soon to formulate comprehensive standards for the application of revenue need considerations in individual rate cases, it would be of no benefit to Houston or Arizona or the ratepayers which they serve. As a result, allowing the Commission's decisions in these cases to become final on the basis that satisfactory quidelines for future application will be forthcoming, works a terrible injustice

[24] For more than a year the Commission has been suggesting that some guidance in this area may be forthcoming in *Ex Parte No. 347, supra* an investigation into the western coal rate structure, but the pendency of this proceeding cannot continue to serve as an excuse for the Commission's errors in individual cases or for its failure to meaningfully address these crucial issues in cases where they serve as the basis for Commission action. *Farmers Union Central Exchange* v. *F.E.R.C.*, 584 F.2d 408 (1978), *cert. den.* —— U.S. ——, 99 S.Ct. 596 (1978).

upon these litigants who will be foreclosed from the opportunity of having their rates reexamined by the Commission for conformance to such guidelines. In light of this peculiar circumstance, alone, the Court should not have applied a relaxed standard of review in these cases.

It should be noted that neither of the precedents relied upon by the court for relaxing the review standard for a temporary approach involved an analogous situation. In each, potential harm to the parties from the agency's use of its temporary approach would be minimized by the fact that the parties would be in a position to benefit from a subsequently developed, more carefully considered approach.[25]

Although, for the reasons discussed herein, petitioners urge this Court to grant certiorari in these cases at this time, if the Court should be inclined not to do so, petitioners request that rather than denying the petition, action be deferred until such time as the issues raised are taken up by the Court. Without appearing presumptuous, it seems certain that the issues involved in the Commission's regulation of rates on this commodity, which is critical to this country's future, not only in terms of energy, but also for the inextricably related economic, political, and even military reasons, are destined to come before the Court. The monies involved in the aggregate in these

[25] See *United States* v. *CAB*, 511 F.2d 1315 (D.C. Cir. 1975); *Public Service Comm'n* v. *FPC*, 467 F.2d 361 (D.C. Cir. 1972). In fact, in both of these cases, the emergency agency actions involved were subsequently set aside by the court. See *United States* v. *CAB, supra; Public Service Comm'n* v. *FPC*, 511 F.2d 338 (D.C. Cir. 1975).

cases are truly staggering. The resolution of the problem will ultimately affect the pocketbook of virtually every electric consumer in the United States.

If, as it seems inevitable, this Court must ultimately address these consequential matters, but it chooses not to do so now, the unique circumstances of these petitioners warrant deferring action on their petition so that the coal transportation prices paid by their millions of customers who directly bear these charges can be conformed to whatever guidelines are finally fashioned.

CONCLUSION

For the reasons discussed herein, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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